

2023 ANNUAL EMPLOYMENT LAW SEMINAR

November 16, 2023

- **NLRB Update**
Speakers: Mathew Harrington, Maricarmen Perez-Vargas
- **Best Practices for Managing Workplace Complaints**
Speakers: Krista Slosburg, Valerie Walker
- **Washington and Federal Law Update**
Speakers: Amy Alexander, Sean Worley

NATIONAL LABOR RELATIONS BOARD (NLRB) 2023 HIGHLIGHTS

Mat Harrington and Maricarmen Perez-Vargas

Topics covered:

- *McLaren Macomb*, 372 NLRB No. 58 (2023):
Nondisparagement and Confidentiality Provisions
 - Memorandum GC 23-05, *Guidance in Response to Inquiries about the McLaren Macomb Decision*
 - Overlap with **Washington Silence No More Act**, RCW 49.44.211
- Memorandum GC 23-08, ***Non-Compete Agreements that Violate the National Labor Relations Act***
- *Stericycle, Inc.*, 372 NLRB No. 113 (2023): **Workplace Rules**

NLRB Refresher

- Section 7 of NLRA protects "the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

NLRB Refresher

Applies to “employees,” but does not define employees. Instead, defines who is not an “employee”:

- Agricultural laborers
- Domestic service of any family or person at their home
- Individual employed by parent or spouse
- Independent contractor
- Employee covered by Railway Labor Act
- Supervisors

Supervisors can...

- Hire
- Transfer
- Suspend
- Lay off
- Recall
- Promote
- Discharge
- Assign
- Reward
- Discipline other employees
- Direct employees
- Adjust grievances

Or effectively recommend such actions.

McLaren Macomb, 372 NLRB No. 58 (2023): Nondisparagement and Confidentiality provisions

Nondisparagement Language:

At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Confidentiality Language:

The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

McLaren cont.

- HELD: These nondisparagement and confidentiality provisions violated employees' Section 7 and 8(a) rights.
- Board overruled *Baylor Univ. med. Ctr.*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Tech*, 370 NLRB No. 50 (2020).

McLaren cont.

Nondisparagement: too broad.

- **Substance:** employee critiques of employer policy can only be restrained from making comms that are “**disloyal, reckless or maliciously untrue.**”
- **Scope:** extended to employer’s “parents and affiliated entities and their officers, directors, employees, agents and representatives.”
- **Time:** no limits.

McLaren cont.

Confidentiality: too much.

- Prohibited from disclosing terms to “**any** third person.”
- Barred from assisting or cooperating with the Board.
- Barred from discussing terms of agreement with former coworkers.

Memorandum GC 23-05, *Guidance in Response to Inquiries about the McLaren Macomb Decision*

- Some implications for supervisors.
- Decision has retroactive application.
 - Potential affirmative requirement for employers to notify former employees that unlawful provisions will not be enforced.
- Employees cannot request broad confidentiality/nondisparagement clauses either.

Memorandum GC 23-05 cont.

- *McLaren* applies to other employer comms.
- Narrowly tailored confidentiality and nondisparagement clauses may be lawful.
- “Saving clauses” won’t save you.
- Other provisions on the chopping block: non-competes, non-solicitations, broad liability releases, cooperation requirements.

Washington's Silence No More Act

Prohibits employers from entering into or enforcing agreements that prohibit disclosure of:

- Conduct that the individual reasonably believes to be illegal discrimination, harassment, retaliation, a wage and hour violation, or sexual assault;
- Conduct that is recognized as being against a clear mandate of public policy; or
- The existence of a settlement involving the same.

Memorandum GC 23-08, *Non-Compete Agreements that Violate the National Labor Relations Act*

- “Except in limited circumstances, I believe the proffer, maintenance, and enforcement of such agreements violates” the NLRA.
- Ok if “narrowly tailored to special circumstances justifying the infringement on employee rights.”

Stericycle, Inc., 372 NLRB No. 113 (2023): workplace rules

- New standard for assessing facial challenges to employer work rules under NLRA.
- Does a challenged rule **have a reasonable tendency to chill employees from exercising Section 7 rights from the perspective of the employee.**
- Standard had to account for “**economic dependency of employees** on their employers.”
 - Would someone thinking about organizing or advocating worry about discipline under this rule?
- **Retroactive** application.

Stericycle cont.

- **Employer intent** is immaterial.
- Rule is presumptively unlawful unless employer can prove the rule advances a legitimate and substantial business interest and that employer is unable to advance the interest with a more narrowly tailored rule.

Implications of *Stericycle*

- A big change.
- Workplace rules will receive heightened and specified scrutiny if challenged.
- Particular problem areas: employee use of company email and technology.

BEST PRACTICES FOR WORKPLACE INVESTIGATIONS

Krista Slosburg and Valerie Walker

What we'll cover

- Policies
- What do you do when you receive a complaint
- Who will conduct the investigation/when to hire an outside investigator
- Working with an outside investigator
- How to effectively close out an investigation

Policies

- Outlining what is, and is *not*, acceptable
- Key elements:
 - Harassment and discrimination will not be tolerated
 - Reporting is encouraged/required
 - Who to report to
 - What happens after a report is received
 - Retaliation will not be tolerated

Policies

- Policies should be:
 - Accessible
 - Clear
 - Followed
- Consider the Human Rights Commission's model policies, available on the Department of Labor and Industries website

What to do when you receive a complaint

- Take all complaints seriously. There is no such thing as a confidential or informal complaint.
- Be compassionate and understanding.
- Explain the process:
 - An investigation will take place, they (and likely others) will be interviewed.
 - The employer will respect everyone's privacy to the extent possible.

What to do when you receive a complaint

- Consider interim measures:
 - Do employees need to be separated?
 - Does there need to be a change to a reporting relationship?
 - Should the accused be put on administrative leave?
 - Should someone be permitted to work from home?
- Be mindful of whether actions could appear retaliatory.

Who will conduct the investigation?

- L & I recommends that, when possible, employers should use an independent, outside investigator.
- Is anyone within the company qualified?
- If the investigation is handled internally:
 - Follow your policies.
 - Take efforts to ensure it's as fair and objective as possible.
 - Document your process.

When to hire an outside investigator

- Is there a conflict of interest?
- What is the nature of the complaint?
- Is litigation likely?
- Who is the accused?

Messaging

- Written communication
 - Acknowledge the complaint
 - Explain the process
 - Who will conduct the investigation
 - Expectations
 - Next steps
- Complainant, accused, witnesses

Working with an outside investigator

- Be clear on the scope
- Do not interfere
- They are not your employment counsel
- Privilege considerations

Closing out the investigation

- Will there be a written report or summary?
- Close out meetings:
 - Complainant
 - Accused
 - Witnesses
- Maintain investigation records

Consider an audit of policies and procedures

- Evaluate policies and procedures
- Remember to conduct trainings

FEDERAL AND STATE UPDATE

Amy Alexander and Sean Worley

2024, by the numbers

- Minimum Wage
 - \$16.28/hour (WA)
 - \$19.97/hour* (SEA)
- Exempt Salary Basis
 - \$67,724
- Non-Compete Threshold
 - \$120,560

New I-9



Employment Eligibility Verification Department of Homeland Security U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 07/31/2026

START HERE: Employers must ensure the form instructions are available to employees when completing this form. Employers are liable for failing to comply with the requirements for completing this form. See below and the [instructions](#).

ANTI-DISCRIMINATION NOTICE: All employees can choose which acceptable documentation to present for Form I-9. Employers cannot ask employees for documentation to verify information in **Section 1**, or specify which acceptable documentation employees must present for **Section 2** or Supplement B, Reverification and Rehire. Treating employees differently based on their citizenship, immigration status, or national origin may be illegal.

Section 1. Employee Information and Attestation: Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.

Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	Other Last Names Used (if any)							
Address (Street Number and Name)			Apt. Number (if any)	City or Town		State ZIP Code						
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number		Employee's Email Address		Employee's Telephone Number							
<p>I am aware that federal law provides for imprisonment and/or fines for false statements, or the use of false documents, in connection with the completion of this form. I attest, under penalty of perjury, that this information, including my selection of the box attesting to my citizenship or immigration status, is true and correct.</p>			Check one of the following boxes to attest to your citizenship or immigration status (See page 2 and 3 of the instructions.):									
			<input type="checkbox"/> 1. A citizen of the United States									
			<input type="checkbox"/> 2. A noncitizen national of the United States (See Instructions.)									
			<input type="checkbox"/> 3. A lawful permanent resident (Enter USCIS or A-Number.)									
<input type="checkbox"/> 4. A noncitizen (other than Item Numbers 2. and 3. above) authorized to work until (exp. date, if any)												
If you check Item Number 4., enter one of these:				<table border="1"> <tr> <td>USCIS A-Number</td> <td>OR</td> <td>Form I-94 Admission Number</td> <td>OR</td> <td colspan="2">Foreign Passport Number and Country of Issuance</td> </tr> </table>			USCIS A-Number	OR	Form I-94 Admission Number	OR	Foreign Passport Number and Country of Issuance	
USCIS A-Number	OR	Form I-94 Admission Number	OR	Foreign Passport Number and Country of Issuance								
Signature of Employee					Today's Date (mm/dd/yyyy)							
If a preparer and/or translator assisted you in completing Section 1, that person MUST complete the Preparer and/or Translator Certification on Page 3.												

Section 2. Employer Review and Verification: Employers or their authorized representative must complete and sign Section 2 within three business days after the employee's first day of employment, and must physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, documentation from List A OR a combination of documentation from List B and List C. Enter any additional documentation in the Additional Information box; see Instructions.

	List A	OR	List B	AND	List C
Document Title 1					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 2 (if any)	Additional Information				
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					

PUMP Act

- Federal right to breaks for expressing breastmilk and private space for doing so.
- Washington: same, for two years after child's birth.

(29 U.S.C. § 218d; RCW 43.10.005)

EEOC Guidance on AI

- Employers are responsible for the tools they use in recruitment, hiring, evaluation.
- Do selection procedures have disparate impact?
- “Substantially less” selection rate for a protected group?

(EEOC-NVTA-2023-2)

Heat Regs

- All Employers w/ employees working outdoors (except “incidental exposure”)
- Outdoor Heat Exposure Safety Program
- Additional obligations triggered
 - Nonbreathable clothing: 52°
 - All other clothing: 80°
- Shade, Water, Acclimatization, Annual Training
- Additional Paid Rest Breaks
 - “preventative cool-down...when they feel they need to do so...”
 - Mandatory – 90° (10 min / 2 hrs), 100° (15 min / 1 hr)
- Resources: <https://www.lni.wa.gov/safety-health/safety-training-materials/workshops-events/beheatsmart#training-and-resources>

Pre-Employment Drug Testing

- No pre-employment testing for cannabis
- Exceptions for:
 - Federal requirements
 - Law enforcement/public safety
 - Safety-sensitive positions

(RCW 49.44.240)

New in Paid Family + Medical Leave

- Family leave for loss of a child
- Employers report dates of birth
- Employer access to PFML claims
- No leave for return of child

THANK YOU!

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